Department of Law Monthly Report
February, 2006

Generally Speaking

Comings and Goings

Daniel Cadra joined the Anchorage Torts/Workers' Compensation section in late February. Daniel is a graduate of Tulane University School of Law and comes to the department after serving as a sole practitioner for the past couple of years. Daniel was previously employed by the state as a district court magistrate in the Second Judicial District. He has also served as a judge in various Pacific Island jurisdictions.

Jennifer (Jenn) Currie accepted a position in the Environmental section in Anchorage and began work on February 6. Prior to her recent move to Alaska, Jenn practiced environmental law for five years with McRoberts, Roberts & Rainer, L.L.P. in Boston, Massachusetts.

The Fairbanks DAO was sorry to say goodbye to **Jill Dolan** who accepted a position with the Fairbanks North Star Borough.

AAG **Susan Daniels** left the Collections & Support section and joined the Labor & State Affairs section in the position advising the Office of Rate Review. She began her new assignment on February 21.

Chelsea Greene, law office assistant, transferred from the Anchorage Environmental section to the Anchorage Torts/Workers' Compensation section. Chelsea has been with the department since August 2004.

The Natural Resources section welcomed a new attorney in the Anchorage office on February 1. **Colleen Moore** joined the department from private practice, most recently with Marston & Cole.

William (Will) Walton moved from the Dallas, Texas, area to work as an assistant district attorney in the Kenai DAO. He visited Alaska a few years ago and had been directing his efforts to return on a permanent basis ever since.

Rick Welsh joined the Transportation section as an assistant attorney general in the Juneau office. Rick has nearly twenty years of experience in Anchorage as a maritime and insurance defense lawyer. He moved to Juneau to begin his career in the Office of the Attorney General.

In This Issue

CIVIL DIVISION

Child Protection

CINA Cases

The section opened many new CINA cases this month based upon allegations in OCS petitions. Two cases this month involved infants born exposed to drugs before birth. One mother, who tested positive for cocaine and methadone, gave birth to her seventh child at home in order to keep OCS from knowing about the birth. All of her other children had been taken into custody and parental rights were either terminated or the children were placed with other relatives. Another mother, whose other child was in OCS custody, was in substance abuse treatment during the course of her pregnancy, but she quit with one month remaining to complete the treatment. Her child was born cocaine positive.

OCS had to take custody of several other infants where no family members were willing to care for them. One infant was born four months premature, but when she was ready for discharge from the hospital no one had made efforts to become involved in caring for the child. Another infant was abandoned by a mother who had a 15-year history of cocaine use and prostitution.

Alcohol is far too often a contributor to CINA cases. This month is no exception. In one case, a mother was found intoxicated to the point of unconsciousness. The only other adult in the home was also intoxicated. An 11-year-old child had been attempting to care for his five younger siblings ages 5, 3, 2, and 1 ½ since the previous day. Human feces and urine were found multiple places in the home. Four empty R&R bottles were also observed in the home.

On another occasion police officers were called to a hotel where they found both parents highly intoxicated yet attempting to care for a one-year-old child. The officers could not locate appropriate food for the child in the room. The mother became combative and volatile and refused to release the baby to the police. The child suffered minor injuries as a result of the mother's actions.

OCS also became involved in several cases involving sexual abuse. In two such cases a stepfather had been sexually abusing the children, but the mother chose to keep the stepfather in the home rather than protect her children. In one of the cases, a seventeen-year-old girl became pregnant as a result of the abuse.

Miscellaneous

Susan Wibker filed a termination petition in a case in which the mother was convicted of fracturing the skull of her 10-month-old baby. As a result of the criminal conviction, the mother was ordered to complete substance abuse treatment. The child's father had a lengthy criminal record including drug offenses and DUI convictions. OCS decided to file a termination petition after it took custody of a new baby who was born cocaine positive.

Commercial and Fair Business

Consumer Protection/Anti-Trust

State Gains Valuable Information at Charities Conference Sponsored by Columbia University.
AAG Ed Sniffen recently attended a conference at Columbia University in New York to discuss the attorney general's role in regulating non-profit entities. Thirteen attorneys general attended the conference, along with representatives from 39 AG offices. A panel with several state AG's and academic scholars from Harvard, NYU, and Columbia on charitable trust matters provided good discussion on issues facing state AG offices. Under the common law theory that the AG of every state has authority to protect the public interest, some states have successfully challenged the conduct of non-profit organizations that harm the intended beneficiaries of the charity. This

"charitable trust" doctrine is recognized in Alaska, and gives the AG authority to ensure that public funds are managed in an appropriate way. Some of the topics covered included:

Duties of board members who sit on non-profit boards. Board members have a duty of loyalty and fiduciary duties of care that require them to act in the best interest of the charity. State AG's can enforce this obligation under common law to ensure board members comply with their responsibilities.

Board Compensation. Excessive compensation is one of the primary claims made by trust beneficiaries. Board members, while entitled to compensation, are subject to AG review to ensure members are not excessively compensated.

Acting outside the scope of the charitable purpose. All non-profit organizations must act within the scope of their purpose. State AG's can investigate and take action against charities who do not comply with the intent of the charity.

Conflicts of interest. Because board members must act in the best interest of the charity, conflicts of interest must be disclosed, and the member should remove himself or herself from board discussion and voting on the conflicting issue. State AG's can take action to remove board members if these conflicts are not resolved by the charity.

IRS Form 990 disclosures. Information provided to the IRS on Form 990 can be used to flag potential problems, especially compensation issues. A review of these forms is something all states should consider.

Protection of volunteer directors. Federal legislation provides some liability protection for directors who serve without compensation. This does not, however, relieve the board from acting in the best interest of the charity, and the charity can still be held accountable for the board's conduct.

A host of other topics came up in discussion. The general consensus was that most states do not regulate charities as much as they should, and the AG's have more authority then they think. Some developing case law in this area has provided precedent for engaging in more careful review of charities operating in the states.

Ed has materials from the conference if anyone is interested.

Division of Corporations, Business and Professional Licensing

Hearings

Calista Corporation/Proxy Solicitation Challenges. AAG Dave Brower represented the Division of Banking and Securities at a hearing to defend the division's decision to take no action on a complaint by Calista Corporation against a Calista shareholder alleging misstatements in proxy solicitation materials. As an ANCSA corporation, Calista's proxy statements and proxy solicitation materials are required to be filed with the division and may be the subject of enforcement by the division if the materials contain material misstatements of fact.

The Calista proxy materials spurred complaints by both a shareholder and Calista. In 2005, a Calista shareholder filed a proxy solicitation seeking a shareholder vote regarding the meeting site for the corporation's shareholders' meeting. The shareholder sent his resolution, along with his supporting statement, to the Delta Discovery, a newspaper with general circulation throughout the Calista region. Calista, in placing this shareholder's resolution on the ballot, made several qualifying statements regarding the shareholder's supporting statements. The shareholder complained to the Division of Banking and Securities that some of Calista's statements were misleading and in violation of the law.

Calista filed a "First Amendment to Calista's 2005 Proxy Statement". The division determined that

the amendment cured the problem, but that Calista should have issued a new proxy based on the changes. The division issued a warning letter stating that in the future, a new proxy would be required in similar circumstances. Calista appealed that ruling but no hearing has been set.

Calista then filed a complaint with the division against the shareholder's original statement (that was sent to the Delta Discovery) alleging it contained material misstatements that would influence shareholders. The division got a response from the shareholder and decided that the statements did not rise to the level of materiality to take action.

Calista appealed that decision and a hearing was held. The administrative law judge, at the outset of the hearing, brought up an issue of jurisdiction. Since the division had not issued an "order," the ALJ believed there was no jurisdiction for an appeal hearing. Notwithstanding that, the ALJ held the hearing and had the parties brief the jurisdiction issue afterwards. We are awaiting his decision.

Decisions

Proposals for agency action filed in three occupational licensing cases in response to ALJ proposed decisions. Under the new Office of Administrative Hearings (OAH) statutes, after an administrative law judge or ALJ issues a proposed decision to the final decision maker, each party is allowed to file a document telling the agency head (or board or commissioner) what action the party believes the agency should take on the proposed decision. The Division of Corporations, Business and Professional Licensing (formerly the Division of Occupational Licensing) recently received three proposed decisions.

Two of the three cases involved applicants with a felony conviction. In one, the ALJ recommended that an application for certification as a nurse aide (CNA) be granted for an applicant with one felony theft by receiving conviction on his record from age 18. In the second case the same ALJ issued a proposed decision recommending against certification for another CNA applicant who was convicted in 2003 of ten counts of felony forgery. On behalf of the Division, AAG Gayle Horetski filed proposals for agency action urging the Board of Nursing to accept the ALJ's proposed decision in both cases.

In the third case, the ALJ issued a proposed decision recommending that an application for licensure as a clinical social worker (LCSW) be granted, even though the person who supervised the applicant's post graduate experience did not meet the statutory requirements for a LCSW supervisor. AAG Gayle Horetski filed a 13-page proposal for agency action urging the Board of Social Work Examiners to reject the proposed decision because of the ALJ's erroneous interpretation of relevant statutes, and to deny the application until the applicant meets all the requirements of AS 08.95.110(a).

Application rejected for sixth time. The Alaska Board of Nursing has denied an application for licensure as a Registered Nurse (RN) from applicant Renee Kimble. This is the sixth license application from Kimble denied by the board. In her initial license application (in 1992) Kimble made numerous deliberate false statements regarding her education, professional credentials, work history, and letters of recommendation. Under AS 08.68.270(1) the board may deny licensure to an applicant who has attempted to obtain a license by fraud or deceit. Kimble has requested an administrative hearing on the denial of her latest license application, now set for April 2006. AAG Gayle Horetski has been assigned to represent the Division of Corporation, Business and Professional Licensing in the case.

ALJ Handley with the Office of Administrative Hearings granted a motion to dismiss filed by AAG LuAnn Weyhrauch in a securities matter on behalf of the Division of Banking and Securities. The order dismissed the hearing request of respondents Index Analysis Pool, LP, and George Heffernan. The respondents had requested a hearing as to a temporary cease and desist order filed by the division alleging false and misleading

statements in connection with an offer of unregistered securities. On February 23, 2006, ALJ Handley issued the final order of dismissal. Dismissal was based on the respondents' failure to prosecute the matter diligently including the failure to appear at two scheduled conferences and the disregard of communications of counsel for the division.

Division of Investments

Ninth Circuit Decision finds Bankruptcy Court lacks jurisdiction to resolve dispute between Sea Hawk Seafoods and ADI. AAG Mary Ellen Beardsley representing the Alaska Division of Investments (ADI) received a decision from the Ninth Circuit Court of Appeals in the Sea Hawk Seafoods (Sea Hawk) case that effectively sends the parties back to state court to litigate Sea Hawk's claims against ADI.

Originally, Sea Hawk sued Valdez Fisheries Development Association (VFDA) in a breach of contract claim and obtained a judgment against VFDA in excess of $2 million. ADI had loans with VFDA in excess of $7 million at the time of the judgment. ADI called the loans due in response to the judgment and was paid $1.7 million by VFDA.

Sea Hawk sought to void ADI's actions by filing a fraudulent conveyance claim (in the same state court action) against ADI and VFDA. VFDA, for its part, filed a Chapter 11 bankruptcy to protect its assets from Sea Hawk. Eventually a settlement was reached between Sea Hawk and VFDA wherein VFDA paid Sea Hawk $1.55 million in full satisfaction of the judgment. Though ADI did not actually sign the settlement agreement, the agreement required approval by ADI and approval of an operating loan to VFDA, which had spent its fish proceeds to pay the $1.55 million.

After the bankruptcy case was dismissed, Sea Hawk then went back to state court to reinstate its claims against ADI so it could then get the remaining portion of its judgment not paid by VFDA (~$900,000+). State courts (superior and supreme) ordered the parties to go back to the bankruptcy court for interpretation of the settlement agreement. The bankruptcy court ruled it retained jurisdiction to decide the issue. The question of jurisdiction is what went up to and was decided by the Ninth Circuit.

The Ninth Circuit determined that the bankruptcy court did not have "related to" jurisdiction for the determination of whether the settlement agreement released Sea Hawk's state court claims against ADI because this determination could "not conceivably 'alter the debtor's rights, liabilities, options, or freedom of action . . . [or] in any way impact [] upon the handling and administration of the bankruptcy estate'" since the bankruptcy estate no longer existed. The Ninth Circuit held that the bankruptcy court had no role in the resolution of the dispute between Sea Hawk and ADI.

The Ninth Circuit also held that the bankruptcy court had failed to "retain" jurisdiction because the orders approving the agreement and dismissing the case did not specifically "retain jurisdiction" nor incorporate the parties' obligation to comply with the terms of the settlement agreement. The Ninth Circuit ruled that the bankruptcy court lacked jurisdiction because the proceeding between Sea Hawk and ADI is not one to vindicate the bankruptcy court's authority or to effectuate the bankruptcy court's decree.

Environmental

DEC's Mixing Zone Regulations. DOL review of DEC's mixing zone regulations was completed by AAGs Cam Leonard and Steve Weaver. The regulations were approved with some changes. The primary changes deal with DEC deference to DNR in defining spawning areas and approving mitigation plans in all waters (except those areas where DFG retains authority). Instead of deferring to DNR decisions in the non-AWC waters, DEC is now making decisions after consulting with DNR.

DEC v. Hinkles. An opposition brief was filed in the River Terrace case. The Hinkles filed a Rule 60(b) motion seeking to vacate their 2000 settlement with the state resolving the cleanup of the dry cleaning solvent, perchloroethylene, which was migrating into the Kenai River from the River Terrace RV Park. In this motion, they assert that their previous lawyer made a mistake by overlooking a 1999 amendment (broadening the innocent landowner defense) to the state's hazardous substances strict liability statute, AS 46.03.822. We vigorously opposed the motion on numerous grounds including that the amendment was not retroactive and thus does not apply to landowner such as the Hinkles who acquired their property before 1999. The Hinkles' son-in-law and lobbyist Virgil Norton actively participated in passage of the 1999 amendment. Under the settlement the Hinkles must pay a balloon payment of $1.3 million plus interest no later than 2010. We anticipate that they will continue their efforts in court and in the political arena to obtain a better deal.

Grounded Tanker T/V Seabulk Pride. AAG Breck Tostevin advised DEC on various issues during the refloating of the grounded tanker T/V Seabulk Pride. Breck assisted DEC in preparation of administrative subpoenas to the vessel operator in an effort to preserve evidence and to investigate the cause of the grounding.

Human Services

Litigation

Pierce* and *Krone. A proposed notice was filed with the superior court to the class members in the *Pierce* and *Krone* matters. The section is working with DHSS to identify the class members and the potential impact (fiscal) to the department to put all of the participants back on Medicaid waivers. It is estimated there are between 250 and 300 putative class members.

The next court date will be in late March/early April for a status conference when the court will set a date for an evidentiary hearing. The hearing is anticipated to last three to five days. AAG Blair Christiansen and Chief AAG Stacie Kraly will handle the hearing together.

Bayless. Senior AAG Dan Branch had oral argument in the *Bayless* case this month. No decision has been made yet on the motion for summary judgment/motion to dismiss.

Okuley. Chief AAG Stacie Kraly will be briefing the issue of retroactive benefits in the *Okuley* matter. The fiscal impact to the state of these benefits is in excess of $1 million.

Longenecker v. State. An answer was filed in the *Longenecker v. State* matter in U.S. District Court in Alaska. A jurisdictional motion to dismiss the matter will be filed soon.

CONs. Two of the three Certificate of Need appeals have been stayed pending settlement discussions; and we have filed a motion to dismiss the third. A fourth appeal was filed last week.

Subrogation/Liens

Medicaid subrogation activity has been brisk for the first two months of calendar year 2006. In January, the AG's office collected a total of $222,313.28 in subrogation/lien payments. For February, month to date, we have collected $276,761.00 from the resolution of 12 cases. This is the largest collection month since the AG's office has been involved in Medicaid subrogation/lien recovery directly. During 2005, the collection amounts were $33,244.53 and $51,039.58 for January and February respectively.

At the time of reporting, the section had a total case inventory of 452 open files and 219 resolved, with $174,246.51 in "receivables" for matters that have been resolved and for which payment is anticipated. The section participated directly as parties to two formal mediation efforts during February, both of which resulted in resolution of the Medicaid liens at issue.

On February 27, 2006, the United States Supreme Court will conduct oral argument in the *Ahlborn v. Arkansas* matter which directly implicates issues surrounding states' rights and obligations in connection with Medicaid lien recovery activity. The State of Alaska has joined as an amicus party to that proceeding and we will observe oral argument on this significant case.

Licensing

The section is in full blown implementation mode related to SB 125, which passed last session. This bill is fully effective in July of this year, but the implementation and transition from the old licensing scheme to the new one is taking up a lot of time. AAG Rebecca Polizzotto has been working closely with all programs (foster care, residential care, assisted living and some day care) to ensure that consistent advice is being given across programs.

Labor and State Affairs

Elections

Northwest Cruiseship Association, et al. v. State, Division of Elections. The superior court issued its decision on February 8 in the cruise ship industry's challenge to an initiative that proposes that taxes and environmental permits, among other measures, be imposed on the cruise ship industry. The initiative sponsors submitted at least 23,424 signatures from qualified voters, more than the 23,286 signatures required for placement on the ballot. The court upheld the division of election's decisions on the signature count, concluding that the division of elections may (1) rely upon a petition circulator's affidavit that all petition signers were registered voters at the time of signature; (2) count signatures of subscribers who registered to vote while the petition was circulating; (3) count the signatures on the booklet pages that included payment information and reject only the signatures on the pages that did not identify who paid the circulators; and (4) count the signatures of subscribers who failed to provide a physical residence address but provided other identifying information that allowed verification or voter registration. AAG Sarah Felix represented the division in this case.

Department of Public Safety

P/V *Enforcer* Damage and Contract Dispute. The Department of Public Safety and this department are seeking contract counsel to bring claims related to the new vessel it had built last year, the P/V *Enforcer*. The matter involves complex admiralty law and contract damage claims that developed when the carrier vessel, *DaFu*, owned by a company based out of the Netherlands, dropped the *Enforcer* when loading it onto the carrier vessel in Houston last year. The slings used in loading failed. The slings were owned by Yacht Path, the carrier's broker-agent; not the owner of the *DaFu.* The damage occurred immediately after the state had accepted the *Enforcer* from the builder in Galveston Texas.

The *Enforcer* (damaged) was shipped on the *DaFu* to Vancouver, where it was repaired. Risk Management handled the contracts for repairs and will be seeking reimbursement of the costs related to the drop. In addition, while the repairs were underway, serious defects in construction were revealed, raising breach of contract issues against the boat builder from Galveston--Kennedy Shipyards. The *Enforcer* eventually made it to Ketchikan, and went into service, but it continues to have stability problems and shaft issues that prevent DPS from using it as intended as a patrol vessel. This case is being handled by AAG Margie Vandor with assistance from AAG Rick Welsh in the Juneau Transportation section, as he has admiralty law and claims experience.

Department of Administration

***Turbo North Aviation, Ltd v. Department of Public Safety*, OAH No. 05-0658-PRO.** In January 2006, Chief Administrative Law Judge Thurbon (under a delegation from the Commissioner of

Administration) adopted, as final, OAH's proposed decision granting the Department of Public Safety's motion for summary judgment regarding the procurement of a turboprop or turbofan aircraft for DPS. The OAH upheld the procurement officer's decision that the aircraft offered by Turbo North (a Falcon 10) was not responsive to the RFP because it failed to meet the minimum baggage capacity requirements at the time proposals were submitted. Further, the proposed modification offered by Turbo North to correct the baggage capacity deficiency constituted an untimely modification of the proposal because the modification was offered after proposals were submitted. The award to Aircraft Marketing, Ltd., which offered a 1984 Westwind II jet, was affirmed. Turbo North had until February 16, 2006, to file an appeal of the decision in superior court. As of February 23, 2006, no appeal has been served on the state. AAG Margie Vandor represented the state in this case.

State v. Bachner and Bowers. The Alaska Superior Court Judge Winston Burbank (pro tempore) ruled that Bachner and Bowers satisfied the criteria for public interest litigant status notwithstanding they were bidders who sought to have a lucrative 40-year lease award vacated and rebid. The state will be appealing this determination to the Alaska Supreme Court after the remand of the underlying action (decision remanded to the Commissioner of Administration/Office of Hearing and Appeals to determine a remedy other than award of bid preparation costs to Bachner and Bowers for improprieties in the procurement process). The state filed a petition for review to the Alaska Supreme Court respecting the remand in January 2006, and is awaiting the high court's decision. AAG Margie Vandor represents the state.

Labor and Workforce Development

Dept. of Labor (OSHA) v. Kurani, Inc. dba Pizza Hut. The state is awaiting approval of a settlement agreement in this dispute involving a number of serious and other citations found at the North Pole Pizza Hut store in January 2003. The company was fined $450 for those violations, and paid the fine. Unfortunately, the company failed to abate the violations, and a re-inspection in December 2003, discovered that failure along with additional violations. The company was assessed $2,000 for the new violations and $27,000 for the failure to abate the January violations. The company contested both the new violations and the failure to abate. After proof that the violations had been abated, the parties were able to resolve the case under terms including re-inspection to ensure abatement. This case is being handled by AAG Larry McKinstry.

Motor Vehicles

Wikle v. State. The superior court affirmed the revocation of a driver's license in *Wikle v. State*, rejecting the driver's due process argument that he did not have sufficient opportunity to prepare for his administrative hearing. AAG Linda Kesterson represented DMV.

Retirement and Benefits

McMullen v. State. AAG Gina Ragle received a favorable ruling from the Alaska Supreme Court in the McMullen appeal. McMullen argued that the computation of his Public Employees' Retirement System (PERS) benefit should include the value of substantial cash-ins of leave that he received during his last three years of employment. The PERS administrator denied the claim.

McMullen was hired in 1969. The law in effect at that time did not specifically exclude leave cash-ins from the definition of "compensation" upon which PERS benefits were based. In 1977 the law was amended to exclude leave cash-ins from the definition of compensation. McMullen was not eligible for leave cash-ins until some time after the law was amended.

The court held that "Before the legislature amended the law in 1977, neither by law nor by practice did McMullen actually acquire a right to have his cashed-in leave included as part of his compensation. He therefore had no right that

could have been impaired when the legislature excluded cashed-in leave from the definition of compensation. Accordingly, the division's refusal to allow McMullen to include his cashed-in leave when calculating his retirement benefits does not violate article XII, section 7 of the Alaska Constitution."

As the court notes in the decision, a ruling in favor of McMullen could have cost PERS $36,000,000. The Division of Retirement and Benefits has 257 claims pending for inclusion of cashed-in leave in PERS compensation that will be affected by this decision.

IMO Susan Lambert. On February 7, 2006, administrative law judge Kay Howard granted the state's motion for summary judgment in a case filed by Susan Lambert claiming disability retirement benefits. The ALJ agreed with the state that Ms. Lambert failed to show that her employment was terminated because of her disability. Ms. Lambert was a member of the Teacher's Retirement System, and had been employed as a deaf education teacher by the Alaska State School for Deaf and Hard of Hearing. Ms. Lambert was deaf since birth. She left her job in order to seek other employment. AAG Sarah Felix represented the state.

Special thanks. To Gina Ragle for responding to the demands due to implementation of changes in the retirement system, including legislative bill drafting, and to Toby Steinberger for taking on additional disability and other retirement and benefits matters that would help Gina be available for the legislative work.

Legislation & Regulations

During February 2006, the Legislation and Regulations section spent an active month editing draft legislation and bill amendments for the 2006 legislative session. The section assigned legislation to assistant attorneys general for review. The section edited bill reviews for the 2006 legislative session.

The section also performed legal reviews of several regulations projects including (1) Board of Game (control of predation by wolves and bears); (2) Department of Commerce, Community, and Economic Development (fisheries revitalization and economic development matching grants; professional licensure fees for naturopaths); (3) Department of Health and Social Services (Medicaid rate-setting; radioactive materials); (4) Department of Natural Resources (state park fees; guide permits in the Kenai River Special Management Area); (5) Alaska Commission on Postsecondary Education (student loans and medical cancellations); (6) Department of Environmental Conservation (water quality and mixing zones); and (7) State Board of Education and Early Development (*Student Data Reporting Manual*).

Natural Resources

State, CFEC v. Carlson. The parties completed briefing before the Alaska Supreme Court in this case in January 2006, and oral argument was held on February 14, 2006. In this class action lawsuit, thousands of nonresident commercial fishers challenge Alaska's former nonresident commercial fishing fees under the Privileges and Immunities Clause of the United States Constitution. This is the fourth appeal to the Alaska Supreme Court in a case that was filed in 1984.

Under former law, the CFEC assessed nonresident commercial fishers' license and permit fees that were up to three times the amounts assessed resident fishers. Although existing fee statutes and regulations are not at issue in this case, the class seeks a refund of that portion of fees paid from 1984 through 2004 that is in excess of the permissible extra amount that the state may assess nonresidents--an amount that could be as much as $40 million, or more, under arguments advanced by the class.

In previous appeals, the Alaska Supreme Court has ruled that the permissible additional amount of fees that may be assessed nonresident commercial fishers may be determined by the application of a

nonresident fee "differential" formula developed by the court. The primary issue before the court in this appeal is whether the superior court correctly ruled that the CFEC is precluded by prior court decisions or state conduct from asserting that the formula may be applied "collectively" to the class. The state argued that the formula may be applied collectively to compare the typical or average contribution by class members toward commercial fisheries management in Alaska to the contribution by the typical or average resident fisher, rather than an application of the formula individually to each class member. Under the collective approaches urged by the state, the typical nonresident and resident contributions toward commercial fishery management in Alaska are approximately equal and, therefore, the nonresident fees are consistent with the Privileges and Immunities Clause. AAG Rob Nauheim represents the state in this case.

Brandal v. State, Commercial Fisheries Entry Commission. The state received a favorable decision from the Alaska Supreme Court in *Brandal v. State, Commercial Fisheries Entry Commission*. Brandal applied for a permanent Chignik purse seine permit in 1977. A hearing officer denied the application in 1982, but it remained pending before the CFEC until it was finally denied in 2003. Brandal continued to fish all the while with an interim-use permit. On appeal Brandal challenged the "special circumstances" clause of 20 AAC 05.630; claimed APA violations; and argued that the delay in the final agency decision violated his rights to due process and provided grounds for estoppel. Superior Court Judge Torrisi affirmed the CFEC decision. The Alaska Supreme Court affirmed the superior court's decision in all respects, but was extremely critical of the delay in issuance of the CFEC decision. However, the court concluded Brandal's due process and estoppel claims failed because he could not demonstrate prejudice from the delay. On the contrary, the court noted, Brandal had received a "windfall of being allowed to fish without being entitled to a permit." Former AAG Zach Falcon represented the commission.

Ninth Circuit Appeal Dismissed as Moot. On February 3, we received an order dismissing as moot a preliminary injunction appeal to the Ninth Circuit in *Patton v. State, CFEC*. The appellant, who claims immunity from the requirements of the Limited Entry Act based on his status as an Alaska Native, had appealed from the denial of his motion for preliminary injunction. Before briefing on the appeal was finished, the district court granted the state's motion for summary judgment, mooting the preliminary injunction issue. Patton also appealed that decision and briefing on the merits is scheduled to begin this April. AAG John Baker represents the CFEC in this case.

Kenai River Guide Regulations Filed. On February 9, regulations implementing comprehensive requirements for Kenai River sport fishing guides were forwarded to the Lieutenant Governor for filing. The new regulations, which will be in effect for the 2006 season, increase guide permit fees, set out penalties for various infractions, clarify requirements for vessel registration, and establish a training requirement and schedule for guides operating within the Kenai River Special Management Area. The regulations were the product of year-long input from the Kenai River Working Group, the KRSMA Advisory Board and other stakeholders, and received significant public comment. AAG John Baker represented DNR on this project, with tremendous support from AAG Steve Weaver in bringing the project in on deadline.

Board of Agriculture and Conservation (BAC) Meeting. AAG Sabrina Fernandez attended a Board of Agriculture and Conservation (BAC) meeting and provided legal support regarding the sale of the Mount McKinley Meat & Sausage. The BAC reaffirmed its prior decision to close and sell the plant prior to December 31, 2006, but authorized the division to pursue evaluating competitive proposals which would keep the kill floor open.

Board of Fisheries Meeting. AAG Steven Daugherty attended another board of fisheries meeting in Ketchikan, advising the board and

ADF&G on legal issues raised by the regulatory proposals considered by the board and ethics and procedural issues during the meeting.

Reutov v. CFEC. This is a Rule 601 appeal of a CFEC decision denying appellant's application for a Prince William Sound salmon drift gillnet fishery entry permit. Appellant has challenged, *inter alia*, the regulations governing the commission's review of applications and issuance of commission decisions. The appellant filed his reply brief on February 21, 2006. The reply brief raised new claims and presented arguments from supplemental authorities; the state moved to strike the reply brief on February 27, 2006. AAG Stan Fields represents CFEC.

Wilber v. CFEC. Oral argument was heard in this case on January 31, 2006. This is a Rule 601 appeal of CFEC's decision to grant a non-transferable Southeast Alaska geoduck clam dive fishery entry permit. Appellant alleged, *inter alia*, that the regulations governing point awards for the subject fishery are not consistent with the enabling statutes.

Bill to Provide Complimentary Fishing and Hunting Licenses to Guard. AAG Stan Fields drafted a bill that authorizes the governor to direct the commissioner of Fish and Game to provide complimentary fishing and hunting licenses to members of Alaska's National Guard who have been deployed for 30 or more days to engage in a national conflict or activities directly supporting a national conflict. The bill was drafted at the request of the Governor's Office and its purpose is to honor members of the Alaska National Guard when they return from defending the Nation and Alaska by providing them with complimentary fishing and hunting licenses.

Division of Agriculture v. Mat-Su Chapter-Alaska Farm Bureau, Inc. On February 16, 2006, AAGs Steven Ross and Sabrina Fernandez filed suit on behalf of the Division of Agriculture against the Mat-Su Chapter for state trademark infringement and related claims to protect its exclusive rights in the Alaska Grown logo. Until recently, the Mat-Su Chapter had been authorized to use the logo on promotional clothing. The suit was filed after the division learned that the Mat-Su Chapter is attempting to register the logo as a federal trademark, and claiming that it is the exclusive owner of the logo.

Predator Control. In *Friends of Animals, et al, v. Department of Fish and Game*, the trial court entered a summary judgment order on January 17, 2006. The case is a challenge to Alaska's five current predator control programs, and the court's 32-page order dealt at length with every claim raised in the litigation. The court concluded that the programs did not violate state or federal law, were not arbitrary or capricious, were adequately supported by the record and by scientific evidence, and ruled in the state's favor on several other counts, as well. However, the judge found that the regulations creating the plans for predator control were inconsistent with a procedural regulation requiring certain details to be covered, and that two of the plans were too large geographically when compared to the findings on which they were based, so she declared the regulations invalid.

Based on advice from the Department of Law, the Board of Game then met in emergency session, on January 25, to repeal the invalid regulations and adopt corrected substitute regulations that addressed the court's concerns. This was necessary because February through April are the most critical times for wolf control, due to snow and light conditions, and the experts agree that the programs will likely fail unless implemented continuously for at least four years. The plaintiffs challenged the new emergency regulations two days later, and sought immediate injunctive relief.

On January 31, the trial court heard the pending injunction motions and denied them, finding that the board had neither violated its own regulations, nor the Administrative Procedures Act in adopting the emergency regulations. Meanwhile, the Board of Game, during a regularly-scheduled meeting, repealed the portions of the procedural regulation

that had led to the inconsistency. On February 3, the Friends of Animals petitioned for review by the Alaska Supreme Court and sought injunctive relief at that level. Following a quick briefing schedule the Supreme Court denied review and the requested injunctive relief. The result, so far, is that the programs may continue through this spring.

The Board of Game will take up making the emergency regulations permanent at its March meeting in Fairbanks, at which the Friends of Animals have promised a lively protest. AAG Kevin Saxby represents the state in the case and before the board.

Opinions, Appeals and Ethics

SOA v. Lucore. AAG Laura Bottger filed a petition for review of Superior Court Judge Joannides' decision in *SOA v. Lucore* to vacate the Alaska Workers' Compensation Board order compelling Lucore to attend a psychiatric evaluation and release any psychiatric records. Lucore reported an injury to her low back while working for the state as a certified nurses' aide.

The state arranged for a medical evaluation of her injury and need for further treatment. The state hired doctor found no organic causes for her pain complaints. He opined that her continued physical complaints might be psychologically based and referred her to an expert in psychiatry for further evaluation.

Lucore, in turn, moved for a protective order before the board, which was denied. The board explained that even though Lucore was not claiming any mental injury, the doctor's examination put her mental or psychological state at issue because if it were established that her complaints were psychological in origin rather than work-related, the state had a defense to liability. The board concluded that the referral for a psychiatric examination was likely to lead to admissible evidence and ordered the examination to go forward and the release records.

Lucore appealed the board's order to the superior court. The superior court decided that because Lucore had not alleged any mental injury, her mental state was not at issue. AAG Patti Shakes moved for reconsideration on behalf of the state but the court denied it. Because the superior court erred in vacating the board's order and ignored the state's need to develop evidence relevant to its defense to liability, the state filed a petition for review.

In re C.H. & M.M. AAG Megan Webb had oral argument before the Alaska Supreme Court in the case *In re C.H. & M.M.* The Office of Children's Services is the appellant in this case, which involves the adoption of two children who were in the legal custody of OCS. OCS withheld its consent to the petitions to adopt on the grounds that the proposed adoptive parents had relinquished their foster care license rather than complete a plan of correction after the state investigated and substantiated a report of harm involving inappropriate behavioral management techniques. Since the petitioners could not be licensed as foster care parents, OCS was precluded from placing children who were in its custody in this home or from consenting to a petition to adopt. The trial court granted the petitions to adopt, finding that OCS had unreasonably withheld consent.

J.S. v. State. Megan Webb also filed a brief on behalf of the Office of Children's Services in *J.S. v. State.* In this CINA appeal, the appellant is a father whose young daughter was adjudicated as a child in need of aid and placed in OCS's legal custody. The father asserted that the trial court erred in finding that the child had been sexually abused or, in the alternative, was at substantial risk of being sexually abused in the future, that the trial court erred in admitting testimony from the child's therapist, and that the trial court erred in admitting testimony by Dr. Bruce Smith regarding his sex offender evaluation of the father.

Natalie D. v. State. The Alaska Supreme Court issued an MO&J in *Natalie D. v. State*, a CINA

appeal in which Megan Webb prepared the appellee brief on behalf of OCS. The supreme court affirmed the trial court's order terminating the mother's parental rights to her three children. The court decided that the mother had not remedied, within a reasonable time, the conduct or conditions that had placed the children at risk.

Ethics. For ethics matters, most of the work we do and advice we give is confidential by law. However, former Department of Health and Social Services Commissioner Joel Gilbertson waived confidentiality regarding the complaint that Dr. Robert Bridges filed against him. Mr. Gilbertson responded to the complaint with information that, if true, would establish that there is no basis for the complaint. We are awaiting additional information from Dr. Bridges before deciding whether to dismiss the complaint.

In addition to work on other confidential ethics matters during February, AAG Dave Jones provided written advice to five former state employees about the Ethics Act's restrictions on their employment after leaving state service. Dave Jones is also monitoring bills proposing changes to the Ethics Act.

Indian Law. AAG Paul Lyle gave legal counsel to several other AAGs on tribal sovereignty and other Indian law issues.

Regulatory Affairs & Public Advocacy (RAPA)

U-05-54, Enstar. RAPA recently filed the pre-filed testimony of its staff economist, Christina Klein, in this docket. The case concerns Enstar's desire to permanently outsource a part of its billing practices to a third party vendor who directly charges ratepayers a 'convenience fee' for its services in providing processing of credit card payments of Enstar's gas bills. Such costs have historically been included in the utility's revenue requirement which is subject to commission review for reasonableness. Ms. Klein's testimony recommends that the commission should: retain jurisdiction over credit card payment processing costs and not allow outsourcing; prohibit 'convenience' fees on regulated utility services; and allow Enstar to include reasonable, substantiated costs of credit card processing in its revenue requirement for future rate cases. The case is scheduled for hearing in April, 2006.

Expert Witness Contracts. RAPA engaged Larkin & Associates PLLC, CPAs and Regulatory Consultants, to provide analysis and pre-filed testimony in two rate cases:

U-05-84 ($25,000 contract) involves a complex rate rebalancing proposal by a rural, local exchange telephone company (Interior Telephone Company) facing competition for the first time in parts of its service area.

U-05-90 ($29,000 contract) involves the determination for Alaska Electric Light & Power of an appropriate revenue requirement, cost of service/rate design and a related special contract for service to a mine. The consultant's efforts will focus primarily upon the rate design.

RAPA Intervention Summary Update. As of February 17, 2006, RAPA is involved in eighteen dockets before the RCA. That number includes sixteen adjudicatory matters in which the AG/public advocate has elected to participate as a party and two rulemaking proceedings in which RAPA has offered formal comments.

Torts and Workers' Compensation

Kinegak v. State. The Alaska Supreme Court affirmed summary dismissal of a claim by an inmate inadvertently held seven days beyond his sentence based on the state's immunity under AS 09.50.250(3) from claims "arising out of...false imprisonment." Overruling *Zerbe v. State*, 578 P.2d 597 (Alaska 1978), the court held that allowing plaintiff to circumvent immunity by couching his claim in terms of negligent record-keeping would be contrary to the

legislature's intent in immunizing the state from liability for certain torts. The court noted that there may, however, be cases where the state's negligence constitutes a truly distinct wrong, even though the victim was injured because of an act constituting a tort enumerated in AS 09.50.250.

Transportation

Hinkle Condemnation. The state condemned a temporary easement to enable the construction of a new bridge over the Kenai River in Soldotna. AAG Peter Putzier, with assistance from former AAG Chris Kennedy, prepared for a hearing before a master to determine the value of the temporary easement. However, the parties settled the matter on the day the hearing was to begin. (Refer to the Environmental section report for more on the Hinkles.)

Gourmet Ventures Condemnation. The state condemned a strip of land near Wasilla to enable re-construction of the Parks Highway from a two-lane road to a freeway. AAG Gary Gantz successfully represented the state's position in a hearing before a master to determine the value of the condemned property. The property owner appealed the master's determination for a trial *de novo* before a jury. As of the date of this memorandum, that trial has been in-progress for seven days.

Off-Road Assignments

DeNardo: *Pro se* litigant Daniel DeNardo has filed a number of cases against superior court judges concerning rulings they have made in their judicial capacities. These cases have been dismissed on the grounds of judicial immunity. Mr. DeNardo appealed one of these dismissals. Transportation section supervisor Jim Cantor wrote a brief to the Alaska Supreme Court on behalf of defendant Judge Rindner seeking to uphold the dismissal of the case against Judge Rindner and, perhaps more importantly, asking the Supreme Court to regulate this frequent litigant's future filings.

Haynes: A *pro se* litigant sued his former public defender for professional malpractice. The superior court dismissed the case because evidence showed the litigant actually committed the crime he was accused of in his prior criminal trial. Any subsequent negligent conduct by his criminal defense attorney was superseded by the greater culpability of his criminal conduct. On appeal, Transportation section supervisor Jim Cantor wrote an appellees' brief on behalf of the former public defender and the public defender agency.

CRIMINAL DIVISION

Anchorage DAO

Man who beat girlfriend to death with frying pan gets 88 years. On January 21, 2003, an APD detective, Michelle Logan, called Lorene Boehly to make an appointment to meet her the next day. Detective Logan was investigating William Willett for having deposited stolen, forged checks into Mrs. Boehly's checking account. One of the checks was a check stolen from a man who had been a roommate with William Willett in a Veteran's Administration hospital in Walla Walla, Washington. Others had been stolen in a burglary in Anchorage. Mrs. Boehly had been a drug counselor at the Veteran's Administration and Willett had been a former client, but the two had begun to live together as boyfriend-girlfriend in her condominium.

Willett had, in fact, lied to Veteran's Administration. The Veteran's Administration had taken him at his word that he was a Vietnam veteran with post-traumatic stress and had been provided services to him. But he had no record of military service.

The next day, when Mrs. Boehly did not show up for work, the Veteran's Administration called her "emergency contact person," a friend, who in turn went to Boehly's house with police. The

doors were locked and no one answered. The officer and the friend forced their way into the house and, in the living room, found Boehly's body. She had been beaten to death. Pieces of a heavy metal frying pan lay around her body. In the bedroom, they found William Willett, semi-conscious, in bed, and suffering from a drug overdose. He had vomited. He had a cut and dried blood on one of his hands. On Mrs. Boehly's calendar, they found a notation about the plan to meet the APD detective.

The medical examiner found that Mrs. Boehly had died from repeated blows by a blunt object to her head. He found cuts and bruises on her arms resulting from her attempts to protect herself. Willett had beaten her with the frying pan until she was dead.

Telephone records showed that Willett had called a cocaine dealer the night of the murder.

On January 23, armed with that information, Detective Bob Glen, APD, interviewed Willett. He confessed that the two had argued when she came home from work. He said he hit her in the head with a frying pan; he did not know how many times. He said he covered her up and went out to get a drink, purchasing crack cocaine instead. He said he had taken an overdose of medication in order to commit suicide. He denied that she had told him of the APD detective's investigation.

After nearly three years, Willett plead to murder in the first degree just before trial. The prosecution had not made any agreements as to the sentence, so the judge was free to impose up to 99 years in jail. On February 24, 2006, Judge Phil Volland imposed a sentence of 88 years.

ADA Sharon Marshall handled the case for the state.

Church volley ball team helps solve a stabbing in the park. On May 7, 2005, at about 10:15 p.m. APD responded to Springer Park at Arctic and Chugach in reference to a stabbing. Members of a Samoan church volley ball team told APD that they had seen the victim, David Fox, and the defendant, Joseph Clark, sitting together at a picnic table in the park. A while later, they saw Fox walking towards them holding his chest. Fox did not say anything, but pointed to Clark who was walking away across the park. When Fox got closer, they saw that he was bleeding from the chest. Police found the defendant, Clark, and found a knife in his pocket. There was blood on the knife that the Crime Lab identified as Fox's in DNA testing. When police talked to Fox, he was intoxicated and could only say that someone stabbed him and he did not know the man's name.

In a jury trial before Judge Michael Wolverton that took six days spread over two and a half weeks, ADA Adrienne Bachman and ADA Dan Shorey presented the state's case and the jury found Clark guilty of assault in the first degree.

Ronald Parks convicted of felony DUI for driving his motor home while drunk. On October 7, 2005, a citizen driving inbound to Anchorage on the Glenn Highway called the Anchorage Police Department to report a drunk driver. The citizen advised the dispatcher that a motor home was being driven erratically: the driver was drifting both within his lane and across lanes, driving slowly, and sometimes straddling the lanes. APD officers stopped the defendant driving the motor home near the Muldoon exit. When asked to perform a field sobriety test, the defendant explained that he was too drunk to do the test. The defendant's breath alcohol level was .229. The driver had prior convictions for DUI in October 2001 and in July 1998.

ADA Katholyn Runnels tried the case for the state.

Fairbanks DAO

The grand jury returned 48 indictments this month in Fairbanks. ADA Danielle Simmons continued working on a credit card fraud and check case that involves victims from Fairbanks to the Mat-Su Valley. Other cases presented to the grand jury included a manslaughter charge that arose from the reckless operation of a snowmachine on the Steese Highway in Circle to felony DUI's and felony failure to stop. In all, 72 new felony cases were referred for prosecution in February. Drug, assault and property crimes were the major contributors, accounting for 53 of the 72 cases referred. Six of the cases referred were for felony DUI.

The misdemeanor unit had 65 DUI's referred for prosecution. The month also saw 49 driving with license suspended cases referred along with 51 assault cases.

ADA Jason Gazewood started an attempted murder case that ended in a mistrial. The defendant is claiming self defense and defense of others. He is claiming he traveled approximately five miles to slash stab the victim because the victim and the defendant's girlfriend had sexual relations. After the state gave its opening, the defense gave its opening statement including its version of the event that has the victim raping the defendant's girlfriend. At that point, the victim interrupted the proceedings and asked why the defendant was having the lawyer lie for him. The retrial is scheduled for May.

Within the office Jennifer Holena moved from the Intake Desk to the Grand Jury Desk. Bridget Towler moved from Receptionist to Intake and Terria Davis moved from Crimes Data Entry to Receptionist. Drew Groth, who was mentioned in the January report, is the new Crimes Data Entry person.

Kenai DAO

Kenai abounded with trials this month. ADA Jean Seaton went to Homer and received a conviction on a felony DUI. ADA Kelly Cavanaugh came to the office from Anchorage to assist and did back-to-back trials for us. He got convictions on both—misconduct involving a controlled substance in the third degree on a cocaine case and misconduct involving a controlled substance in the fourth degree on a marijuana grow case. ADA Lisa Thomas did a great job on a shoplifting case, and ADA Angela Jamieson has been working away at her new assignment as our domestic violence attorney.

The office's newest attorney, Will Walton, started this month. He just moved up from the Dallas, Texas, area. He worked a week, took the Bar, and has now started his first trial. He's definitely into the Kenai spirit of leaping into the fray. His previous experience is in civil litigation but he is enthusiastically looking forward to being a prosecutor.

The office started a first-degree murder trial also, despite the fact that the defendant got a new attorney the Friday before the President's day weekend. When the attorney told the court that he needed time to prepare, the defendant said that he had a three-day weekend and that should be enough. Two hours into voir dire the defendant rethought his situation and asked for a continuance.

Kodiak DAO

I asked her if it was okay, and she didn't say "no". A 59-year-old Old Harbor man was convicted of sexual assault in the third degree for engaging in sexual contact with an unconscious woman. The man was sentenced to 36 months in jail with 23 months suspended and placed on probation for five years.

Sticky Fingers. A 30-year-old Kodiak woman was convicted of embezzling $1800 from the Safeway liquor store. When this first time felony offender informed the judge that she wished to reject probation, she was sentenced to a flat time sentence of 10 months in jail.

Frequent Flyer. A 23-year-old Oregon woman was given a five-year suspended imposition of sentence and ordered to serve six months in prison as a special condition of probation following her plea to misconduct involving a controlled substance in the fourth degree. She was also ordered to pay a $500 fine. This defendant had been found importing a small amount of methamphetamine into Kodiak and had been indicted for possession with intent to distribute.

I was upset too, but.... A disgruntled Seahawks fan was sentenced to a composite 36 months with 30 months suspended following his plea to two counts misdemeanor criminal mischief in the fourth degree and one count of attempted witness tampering. The man had knocked out two car windows following the Seahawks' loss in Superbowl XL. The fan, who had been invited to the victim's house to watch the game, broke out the windows in clear view of the victim who was standing 10 feet away after going outside to smoke a cigarette. The defendant later called the victim from jail offering to pay restitution if the victim would tell the cops that he made a mistake when he picked him out of a lineup.

Palmer DAO

On February 3, 2006, a Palmer jury found Cynthia Estes guilty as an accomplice to murder in the first degree, murder in the second degree and burglary in the first degree. Her husband and co-defendant, Richard Deremer, was convicted of murder in the first degree, murder in the second degree, burglary in the first degree, arson in the first degree and tampering with evidence last November.

In 2003, Estes and Deremer planned to kill forty-nine-year-old David McKinney and take his prescription medications. Estes, who used drugs and did some housekeeping for McKinney, knew where McKinney kept his medications. On the day of the murder, Estes drove Deremer to McKinney's house. Deremer kicked in the door and shot McKinney in the head. Estes came back to pick up Deremer, and they tried to open the safe. Deremer returned later to cut open the safe and burn McKinney's house.

Deremer's defense at trial was that another person, Terry Sudbury, killed McKinney. In her trial, Estes claimed that she was a victim of domestic violence, did not have the intent to kill McKinney and was coerced into making admissions about the crime. ADA Suzanne Powell prosecuted this case.

A Palmer jury found Ralph Winterrowd guilty of driving on a suspended license. Winterrowd believes the State of Alaska does not exist, the Department of Motor Vehicles has no authority to issue driver's licenses and that Chickaloon is a sovereign nation with the authority to issue driver's licenses. He was sentenced to 180 days, with 150 days suspended, a $5000 fine, with $4000 suspended, and five years of probation. ADA Jarom Bangerter was the prosecutor for the state.

Forty two people were indicted on new felony charges by the two Palmer grand juries in February.

SAVE THE DATE

April 26-28	2006 Alaska Bar Convention - Anchorage
August 6-10	Conference of Western Attorneys General Summer Meeting - Anchorage